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October 20, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 22, 2006

Case Number: TSO-0368

This Decision concerns the eligibility of XXXXXXXXXXXX (the Individual) for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should not be restored at this time.

I. APPLICABLE REGULATIONS

The regulations governing an individual's eligibility for access authorization (also referred to as a security clearance) are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing

officer. *Id.* § 710.21(b)(3). The burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, *i.e.*, that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

II. BACKGROUND

In 1980 and 1982, during military service, the Individual was involved in two incidents related to alcohol use. In the first incident, he failed to report to duty.¹ In the second, he was driving with an open container of alcohol.² Later, in 1986, the Individual was arrested for Driving While Intoxicated (DWI), with blood alcohol level (BAC) readings of 0.9 and 1.0.³

In August 2003, the Individual and his wife sought marital counseling.⁴ During that counseling, the Individual's wife expressed concern about his alcohol use.⁵ After a period of counseling, the Individual was referred to another counselor, who then referred the Individual to a psychologist experienced in treating substance abuse (the Treating Psychologist).⁶

In December 2003, the Individual began alcohol-related counseling with the Treating Psychologist.⁷ Initially, the Individual told the Treating Psychologist that he sought to be educated about the effect of alcohol, even moderate levels, on his health. The Individual stated that he was positive for hepatitis C, that he was taking medication for depression and anxiety, and that his wife had expressed concerns about his alcohol use. Thereafter, the Individual entered an intensive outpatient treatment program, which he completed in April 2004. At the end of the program, the Individual stated that he had abstained from alcohol since January 2004 and intended to continue to abstain for an extended period of time. His treatment program provided for an after-care program at no cost, but he declined that program.

¹DOE Ex. 6 at 102-04 (transcript of 1993 personnel security interview).

²DOE Ex. 15 at 7, 9 (security questionnaire).

³DOE Ex. 6 at 35 (1993 personnel security interview); DOE Ex. 15 at 7, 9 (security questionnaire). The District Attorney declined to prosecute the case.

⁴DOE Ex. 5 at 15 (transcript of 2005 personnel security interview).

⁵DOE Ex. 5 at 79 (transcript of 2005 personnel security interview).

⁶DOE Ex. 5 at 16-27 (transcript of 2005 personnel security interview).

⁷May 15, 2005 Report of Treating Psychologist.

In June 2004, the Individual underwent a psychological evaluation in connection with the newly established Human Reliability Program. As a result, he was referred for a fitness-for-duty examination. The contractor's occupational medicine psychologist (the Site Psychologist) diagnosed the Individual as suffering from alcohol abuse.⁸ As a result, the Individual's continued employment was conditioned upon no access to classified materials, abstinence, participation in alcohol-related counseling, and unannounced alcohol tests.⁹ The Individual then returned to the Treating Psychologist for individual and group counseling.¹⁰

In April 2005, the Individual was arrested for "aggravated DWI." The Individual's BAC was measured as 0.21.¹¹ The Individual was determined to be unfit for duty and was placed on leave. In June 2005, the Individual completed a two-week residential treatment program.

In July 2005, a DOE security specialist interviewed the Individual and referred him to a DOE consultant-psychiatrist (the DOE Psychiatrist).¹² Around the same time, the Site Psychologist conditioned the Individual's fitness-for-duty on participation in a further, more intensive, alcohol treatment program.¹³

Shortly thereafter, the Individual began a rational behavior therapy treatment program, as an alternative to Alcoholics Anonymous. Based on their mutual interest, the Individual and the Treating Psychologist decided to set up a local rational behavior therapy program. In the fall of 2005, they traveled, at their own expense, to obtain training. As a result, they began a program, with the Individual as the facilitator of a weekly meeting, and the Treating Psychologist as the professional adviser.

In November 2005, the DOE Psychiatrist interviewed the Individual and found that he met the criteria for alcohol abuse, set forth in the Diagnostic and Statistical Manual IV (Text Revision) published by the American Psychiatric Association (the

⁸DOE Ex. 5 at 36 (transcript of 2005 personnel security interview).

⁹DOE Ex. 8.

¹⁰DOE Ex. 5 at 38 (transcript of 2005 personnel security interview).

¹¹DOE Ex. 9 (criminal complaint statement of probable cause). In August 2005, the Individual pled guilty to a simple DWI and received a deferred sentence.

¹²DOE Ex. 5 (transcript of 2005 personnel security interview).

¹³DOE Ex. 8.

DSM-IV-TR).¹⁴ The Individual told the DOE Psychiatrist that, with the exception of the April 2005 incident, he had not consumed alcohol since June 2004.¹⁵ The DOE Psychiatrist opined that one year of treatment and abstinence would constitute adequate evidence of reformation and rehabilitation.¹⁶

In February 2006, the DOE issued a Notification Letter, stating that the Individual's alcohol-related incidents and the DOE Psychiatrist's diagnosis constituted derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8(j) (Criterion J).¹⁷

The same month, the Individual responded to the Notification Letter. The Individual stated in part:

I agree with [the DOE Psychiatrist's] diagnosis under DSM IV 305.00. However, [the DOE Psychiatrist] also states that an adequate recovery period is one year of participation in the recovery program that I am currently enrolled in, and maintenance of sobriety for that period. The one year time period is dated from 14 April 2005 through 14 April 2006. During my hearing, I will show evidence of compliance with [the DOE Psychiatrist's] recommendation for adequate evidence of rehabilitation and reformation.

* * *

I agree with [the Site Psychologist's] diagnosis in his report dated 31 August 2004. My current period of abstinence from alcohol has extended from approximately 16 June 2004 through the present, with a single incident, I have been in complete compliance with [his] fitness-for-duty restrictions.¹⁸

The Individual requested a hearing, and his request for a hearing was forwarded to the Office of Hearings and Appeals (OHA).

On June 1, 2006, the Individual filed copies of four reports concerning his treatment and abstinence. The accompanying

¹⁴DOE Ex. 3 (DOE Psychiatrist's report).

¹⁵DOE Ex. 3 at 6.

¹⁶DOE Ex. 3 at 14.

¹⁷DOE Ex. 1.

¹⁸DOE Ex. 2.

letter stated that the Individual would offer the reports into evidence at the hearing "in the event DOE determines a hearing is still necessary." The letter stated that the documents were "proof that [the Individual] has addressed all concerns which are enumerated in the notification letter and has met all of [the DOE Psychiatrist's] requirements for adequate evidence of rehabilitation and reformation."

All of the reports addressed the issue of abstinence. The Site Psychologist stated:

Based on the progress I have seen [the Individual] make since the evaluation began in June 2004, and in spite of the single relapse occurring in April 2005, I support his request for reinstatement of his access authorization.¹⁹

The Treating Psychologist indicated that he believed the Individual had been abstinent since April 2005.²⁰ The director of the Individual's treatment program (the Program Director) stated that he concurred with the DOE Psychiatrist's opinion that one year of treatment and abstinence was adequate. The Program Director then stated: "To the best of our knowledge, [the Individual] has met this standard."²¹ Finally, the site medical department stated that twice-weekly drug and alcohol tests since November 2004 were negative.²²

III. THE HEARING

The DOE Psychiatrist testified first and discussed his report. His diagnosis of alcohol abuse was not in dispute, and he focused his testimony on what length of treatment and abstinence would constitute adequate evidence of reformation and rehabilitation. He stated that, based on the Individual's initiative in setting up a local rational behavior therapy program, he believed that one year would be adequate.²³

The Individual's wife testified. She testified to the Individual's involvement in his recovery program and with their family. As to the Individual's abstinence since July 2003, she cited alcohol consumption in November 2004 and July 2005.²⁴ She

¹⁹ May 8, 2006 Letter at 2.

²⁰ May 15, 2006 Letter.

²¹ Undated Letter to Individual's counsel.

²² May 16, 2006 Letter.

²³ Transcript of Hearing (Tr.) at 23-25.

²⁴ Tr. at 106, 109, 114-115.

testified that she believed that he had not consumed alcohol since July 2005.

The Individual testified in detail about his recovery programs and his involvement with his family and church. Before his wife testified, he testified that, with the exception of the April 2005 incident, he had been abstinent from alcohol since June 2004.²⁵ After his wife's testimony, the Individual acknowledged the July 2005 use and testified that he had been abstinent since that time.

The two psychologists testified about their favorable reports. When asked if the new information about alcohol use affected the views reflected in their reports, they had somewhat different answers. The Site Psychologist stated that he had seen the Individual every 60 to 90 days and that the Individual had consistently denied any use after April 2005. The Site Psychologist stated that his report would have been less positive. He referred to the report's statement that, given the Individual's progress, occupational medicine would not have any medical restrictions on the Individual; the Site Psychologist stated that the medical department would have to "reassess that."²⁶ The Treating Psychologist indicated that the new information did not change his overall assessment that the Individual had a favorable prognosis.²⁷

The Individual's former team leader testified about his work relationship with the Individual. He testified that the Individual was a valued employee and that the Individual was committed to resolving his alcohol problem.²⁸

After listening to all of the testimony at the hearing, the DOE Psychiatrist testified again. Although the Psychiatrist indicated that some of the hearing testimony was not positive, he stated that, given the Individual's involvement in the local therapy program, he would not modify his opinion that one year of abstinence would be adequate evidence of reformation and rehabilitation.²⁹

Six weeks after the hearing, the Individual filed three affidavits: his own, his wife's, and the Treating

²⁵Tr. at 48-51.

²⁶Tr. at 146.

²⁷Tr. at 200-01.

²⁸Tr. at 70, 78-79.

²⁹Tr. at 260-269.

Psychologist's. The affidavits attested to the Individual's abstinence since the hearing.

IV. APPLICABLE STANDARD

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). In that case, the individual has the burden to prove that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a).

Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. In considering derogatory information, the DOE considers various factors including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. *Id.* § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. *Id.* § 710.7(a).

V. ANALYSIS

The Notification Letter cited the DOE Psychiatrist's diagnosis of alcohol abuse, a security concern under Criterion J. The Individual does not dispute that diagnosis. Accordingly, the Criterion J issue is whether the Individual has shown adequate evidence of reformation and rehabilitation. The Individual does not dispute the DOE Psychiatrist's opinion that one year of abstinence would constitute adequate evidence of reformation and rehabilitation.

I am convinced that the Individual has participated in a year of counseling and related activity. I base that finding largely on the testimony of the Treating Psychologist.

The Individual's initiative in helping others with alcohol problems supports his claim of abstinence. The testimony of his wife and the Treating Psychologist - that they believe that he has been abstinent since July 2005 - also supports that claim. But the most knowledgeable witness on the issue is the Individual, and I am unwilling to rely on his testimony.

The Individual was not truthful during the administrative review process. He told the security specialist and the DOE Psychiatrist that he had been abstinent since April 2005. He reiterated that untrue statement in his letter requesting a hearing. He submitted current reports from the Site Psychologist, the Treating Psychologist, and the Program Director that repeated that untrue statement. He cited those reports to me as evidence that he had met the one year standard and, therefore, that a hearing was not necessary. He repeated that untrue statement at the hearing. It was not until his wife disclosed the July 2005 use that he changed his testimony.

Given the Individual's lack of truthfulness at the time of the hearing, I am skeptical of his revised version of his abstinence period, and I find that I cannot rely on his testimony about it. Moreover, the testimony of the medical professionals has been influenced, at least to some degree, by the Individual's untruths.³⁰ As the foregoing indicates, I conclude that the Individual has not met his burden of demonstrating adequate evidence of reformation or rehabilitation.

VI. CONCLUSION

The Individual has not resolved the Criterion J concern set forth in the Notification Letter. Therefore, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I have concluded that the Individual's access authorization should not be restored. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: October 20, 2006

³⁰Tr. at 133-37, 145-46 152 (Site Psychologist); 198-200 (Treating Psychologist); 260-269 (DOE Psychiatrist).